EMPLOYER ALERT: GEORGIA’S RESTRICTIVE COVENANT STATUTE

Misty R. Martin & Caitlin Martini

As a reminder, in 2011, the Georgia legislature updated its restrictive covenant statute, Ga. Code Ann. § 13-8-53 (May 11, 2011). Companies and their in-house counsel should evaluate whether their current and prospective non-compete agreements comply with these changes. Additionally, any employer with employees bound by a pre-May 2011 non-compete agreement should consider having the current employee promptly sign a new non-compete agreement. However, by doing so, caution must be utilized, as adequate consideration is always necessary to make any new contract binding.

Here are a few issues to consider:

1. Adequate Consideration Requirements.

Under Georgia law, one of the requirements for a restrictive covenant, such as a non-competition agreement, to be enforceable, is that the agreement be founded upon valuable consideration. See Fab'rik Boutique, Inc. v. Shops Around Lenox, Inc., 329 Ga.App. 21, 25, 763 S.E.2d 492, 495 (Ct. App. Ga. 2014). When a restrictive covenant is provided as part of an initial employment contract, the offer of employment itself is considered sufficient consideration to make the restrictive covenant enforceable. See Swartz Investments, LLC v. Vion Pharm., Inc., 252 Ga. App. 365, 369, 556 S.E.2d 460, 463 (2001)(quoting Roberts v. Tifton Med. Clinic, 206 Ga.App. 612, 615, 426 S.E.2d 188 (1992) (“[W]hen an employee agrees to subject himself to possible future restrictions, he does so in exchange for the opportunity to have the jobs.”). Nevertheless, the Swartz court noted that the lack of consideration given along with a restrictive covenant is “an additional justification for subjecting employment agreements to heightened scrutiny.” Id.

However, in Keeley v. Cardiovascular Surgical Associates, P.C., the court considered whether a restrictive covenant was void since the terms of employment had been agreed to prior to the issuance of the restrictive covenant. 236 Ga. App. 26, 30, 510 S.E.2d 880, 885-86 (1999). In that case, the court found that the restrictive covenant was still enforceable because the terms of the employment agreement were still being negotiated at the time the restrictive covenant was added. Id. Nevertheless, the court appeared imply that, if the agreement had already been finalized prior to the inclusion of the restrictive covenant, then additional consideration would need to be provided in order to make the covenant enforceable. See id.

Overall, it is important to provide some type of consideration when seeking to have an existing employee sign on to an updated non-compete agreement. However, the type of consideration may vary depending on the circumstances of the updated agreement and whether the employee’s original employment contract included a non-compete agreement.

2. “Blue Pencil” Rule of Severability.

Under Georgia’s prior legislation governing restrictive covenants, the “blue pencil” rule of severability did not apply to restrictive covenants contained in employment contracts. However, under to Ga. Code Ann. § 13-8-53, which went into effect on May 11, 2011, the blue pencil rule of severability now applies. The blue pencil rule allows judges to modify an otherwise overly broad restrictive covenant in order to make it enforceable, instead of voiding the whole provision or an entire agreement based upon a judge’s determination that one portion of the restrictive covenant is overbroad and therefore unenforceable. See Vulcan Steel Structures, Inc. v. McCarty, 329 Ga.App. 220, 225 (2014).
According to the updated statute, courts may now modify a covenant that is not in compliance with the provisions of the statute, so long as the modifications do not render the covenant more restrictive with regard to the employee than it was under the original version that was drafted by the parties. Ga. Code Ann., § 13-8-53(d); see also Ga. Code Ann., § 13-8-54(b). Nevertheless, it remains imperative that restrictive covenants—including non-compete, non-disclosure, and non-solicitation agreements—are narrowly tailored according to the criteria outlined in the Ga. Code Ann., § 13-8-53, in order to avoid unnecessary litigation and modification of existing contracts.


Under Georgia’s updated statute, employers may now restrict the post-termination competitive activities of four categories of employees. These employees include: (1) sales employees; (2) key employees or professionals; (3) management employees (which are described more fully in the statute); and (4) employees that customarily or regularly solicit customers for the employers. However, any non-compete provision which restricts any employees who do not fall into these categories from competing with the employer, after termination of the employment agreement, will be found to be overbroad and unenforceable by the court.

The new statute also provides that the activities, products, or services found to be competitive to the employer may be construed to include any such activities, products, or services “of the type conducted, authorized, offered, or provided within two years prior to termination,” or any similar language utilizing a time period of the same or a shorter duration. See Ga. Code Ann., § 13-8-53(c)(1).

As to the geographic area in which the employer can restrict the employee from competing with the employer’s business, Ga. Code Ann., § 13-8-53 provides that employer’s may now “estimate” the employee’s future territory when defining the area to which the non-competition provision applies. According to the statute, the phrase, “the territory where the employee is working at the time of termination,” or language similar to that, is considered sufficient to describe the geographic area where the employee will be restricted from competing with the employer, so long as the employee “can reasonably determine the maximum reasonable scope of the restraint at the time of termination.” See Ga. Code Ann. § 13-8-53(c)(2). Overall, Ga. Code Ann., § 13-8-53 provides greater latitude for employers to determine the territory in which they can restrict an employee’s competitive activities.


Another important aspect of Georgia’s updated law governing restrictive covenants is that it modified the restrictions governing the enforceability of non-solicitation provisions. The statute provides guidance on how to restructure non-solicitation provisions contained in an employer’s employment contract, but case law has also been informative on this issue.

The below example of a non-solicitation clause provides a basis for determining the scope of enforceability for non-solicitation agreements that pertain to the solicitation of an employer’s current employees:

While he shall serve as a Director of the Company and for a period of twenty-four months after he shall cease for any reason to serve as a Director of the Company, each of the Directors shall not ... solicit, seek or accept business from, interfere with or endeavor to entice away from the Company any Client or employee of the Company. For purposes hereof, the term “Client” shall mean any person or entity that (i) received service of any type from [the] Company during the twenty-four month period immediately preceding the last day that the Director serves as a Director of the Company or (ii) has been contacted by the Company for the purpose of offering to provide Company services or products prior to the last day that the Director serves as a Director of the Company.
Carson v. Obor Holding Co., LLC, 318 Ga. App. 645, 650, 734 S.E.2d 477, 482 (2012). The non-solicitation clause at issue in Carson was found unenforceable, but remains instructive not only as to the limits of non-solicitation agreements, but also as to the portions that were not found to be in violation of Georgia’s restrictive covenant statute. In Carson, the court held that the clause violated Georgia law because it forbade the employee from contacting any client or prospect of the company, regardless of whether he actually served those clients or prospects, and contained no territorial restriction on the employee’s restriction on solicitation. Id. at 650. However, the court did not find a problem, specifically, with the clause’s restriction on the employee’s solicitation of employees of the company or, generally, clients of the company, so long as they were limited to those that the employee had worked with during his time as an employee. See id. Additionally, the court found issue with the fact that the clause restricted the plaintiff from passively “accepting any work from any such clients,” which the court found impermissibly overbroad, since the client may initiate such contact, so long as the plaintiff was not seeking out such business himself. See id. This case is instructive, and may help employers to begin to modify their non-solicitation agreements to conform to Georgia’s updated statute. Nevertheless, it is worthwhile to seek additional guidance on this issue, in order to avoid running afoul of the limits imposed on these types of covenants.


Under Georgia’s prior law governing restrictive covenants, non-disclosure provisions were limited in duration. If a non-disclosure provision relating to the protection of confidential information was not limited in time or provided for too long of a time period, Georgia courts would strike it down in its entirety. See Atlanta Bread Co. Intern., Inc. v. Lupton-Smith, 292 Ga.App. 14, 20, 663 S.E.2d 743, 748 (Ct. App. Ga. 2008). However, under the new law, provisions prohibiting the disclosure of confidential information or trade secrets may now be unlimited in time. See Ga. Code Ann. § 13-8-53(e). Such provisions are now able to provide for the protection of confidential information or trade secrets so long as the information remains confidential or continues to be a trade secret. See Ga. Code Ann. § 13-8-53(e). Additionally, the new law allows employer’s unlimited discretion in limited the geographic area within which the information must be kept confidential or kept as a trade secret, so long as the information remains confidential or continues to be a trade secret. See Ga. Code Ann. § 13-8-53(e).

6. Conclusion.

The case law surrounding the issues discussed above is still developing, as the updated statute is still relatively new. According to the statute, there should now be more leeway in drafting non-disclosure provisions in an employment agreement. However, it is important to keep in mind that non-solicitation and non-competition provisions, in particular, should be narrowly tailored in order to ensure that they will be found to be enforceable in a court of law. For these reasons, it is advisable to seek legal counsel when reformatting the restrictive covenants contained within one’s employment contracts, so as to avoid unnecessary litigation regarding the enforceability of such covenants.